Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

DEVON ENERGY CORPORATION,

Petitioner,

v.

KENNETH L. SALAZAR,
SECRETARY OF THE INTERIOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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May 2009

QUESTIONS PRESENTED

1. Whether a federal agency that has given its regulation a definitive interpretation must engage in notice-and-comment rulemaking pursuant to the Administrative Procedure Act to reverse that interpretation, where the initial interpretation has been followed for many years and set forth in mandatory instructions to regulated entities.

2. Whether a federal agency that changes its interpretation of its own regulation may give retroactive effect to the new interpretation.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

Petitioner, plaintiff below, is Devon Energy Corporation. Petitioner has no parent company, and no publicly held company owns ten percent or more of its stock.

Respondent is Kenneth L. Salazar, who is sued in his capacity as Secretary of the United States Department of the Interior. His predecessors Gale A. Norton and Dirk Kempthorne were likewise sued below in their capacities as Secretary of the Interior.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Devon Energy Corporation ("Devon") respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the D.C. Circuit (Pet. App. 1a–23a) is reported at 551 F.3d 1030. The opinion of the United States District Court for the District of Columbia (Pet. App. 24a–40a), which was unreported, is available at 2007 WL 2422005.

JURISDICTION

The decision of the D.C. Circuit was entered on December 23, 2008. A timely petition for rehearing and rehearing *en banc* was denied on February 13, 2009. (Pet. App. 62a.) This Court's jurisdiction rests on 28 U.S.C. § 1254(1). The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. The district court had jurisdiction pursuant to 28 U.S.C. § 1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Administrative Procedure Act provides in relevant part as follows:

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice

thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections

556 and 557 of this title apply instead of this subsection.

5 U.S.C. § 553(b)–(c).

STATEMENT OF THE CASE

This case addresses a royalty dispute involving hundreds of millions of dollars and presenting a fundamental question of administrative law that has divided the courts of appeals.

Pursuant to the Minerals Leasing Act, 30 U.S.C. § 181 *et seq.* ("the Act"), the Secretary of the United States Department of the Interior ("DOI") issues and administers leases to private entities authorizing the production and sale of various minerals from federal lands, including natural gas. Under the Act, the lessee must pay "a royalty at a rate of not less than 12.5 percent in amount or value of the production removed or sold from the lease." *Id.* § 226(b)(1)(A). The regulations at issue in this case govern the calculation of such royalties.

Congress has given the Secretary the authority "to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of [the Act]." *Id.* § 189. During the period relevant to this litigation, the Secretary had formally delegated his authority over royalty collection to the Director of

DOI's Minerals Management Service ("MMS").[1] The Director, in turn, had redelegated this authority to the Associate Director for Royalty Management.[2] MMS defined "authority" to mean "[t]he ability to make the final, binding decision and/or take specific action as an official representing the U.S. Government."[3] Consistent with the foregoing delegations, the relevant regulations relating to royalty issues were promulgated by MMS, and not by the DOI Secretary or Assistant Secretary. *See, e.g.*, Final Rule, Revision of Gas Royalty Valuation Regulations and Related Topics, 53 Fed. Reg. 1230 (Jan. 15, 1988).

In 1988, MMS promulgated gas royalty valuation regulations providing that costs incurred by a lessee

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[1] Dep't of the Interior, 218 Departmental Manual 1.1 (May 26, 1983) ("The Director, Minerals Management Service, is authorized to exercise the Secretary's authority to establish a comprehensive Royalty Management System which ensures that the Government is paid timely and in full for the leasing of all mineral lands and for its contractual royalty shares, rentals, bonuses, and other fees for minerals extracted by lessees . . . ."). *Cf.* Dep't of the Interior, 218 Departmental Manual 1.1 (Aug. 29, 2002), *available at* http://206.131.241.18/app_dm/act_getfiles.cfm?relnum=3524.

[2] Minerals Mgmt. Serv., 220 Service Manual 1.5 (Aug. 29, 1991) ("[T]he authorities delegated to the Director in 218 DM 1 for managing and administering the Royalty Management Program are redelegated to the Associate Director for Royalty Management. . . . The Director retains the authority to . . . [a]pprove rules and publish in the *Federal Register*.").

[3] Minerals Mgmt. Serv., 200 Service Manual 1.4A (July 20, 1983).

in rendering its gas marketable are *not* deducted from the gross value of the gas against which royalty obligations are calculated, 30 C.F.R. §§ 206.152(i), 206.153(i) (1988), but that costs of transporting the gas *are* deducted, *id.* §§ 206.156, 206.157. (Pet. App. 4a–5a.) After establishing this so-called "marketable condition rule," MMS faced "many questions . . . on how to report and pay royalties on coalbed methane," (Pet. App. 63a), a resource that accounts for roughly 10% of total domestic natural gas reserves.

MMS referred these questions regarding coalbed methane gas to its Royalty Policy Board, which MMS "established to develop royalty program policy," and to act as a "decision making body to review, discuss, evaluate and decide policy decisions on proposals aimed at improving the [Royalty Management Program]." (C.A. App. 100.) The Board consisted of the MMS Deputy Director, the Associate Director for Royalty Management, and the Associate Director for Policy and Management Improvement. (*Id.* at 101.)

Among other questions, the Board addressed the proper treatment of the costs of dehydrating and compressing coalbed methane gas. After considering applicable legal authorities and agency precedents, the Board concluded that lessees should be allowed to deduct, as part of their transportation allowance, their dehydration and compression costs incurred downstream of the approved royalty measurement point. (*Id.* at 104–05.) The Board recommended that detailed instructions concerning these decisions be given to all affected parties. In response, the MMS Deputy Director issued two official statements containing the agency's instructions for valuing and

reporting royalties: "Coalbed Methane Valuation and Reporting Guidelines" dated December 7, 1995, and the more generally applicable "Compression Guidance" dated December 8, 1995. (Pet. App. 7a.) These guidance documents reflected the conclusion that dehydration and compression costs could be deducted from the royalty base as transportation costs. (*Id.* at 7a–8a.)

The MMS Associate Director for Royalty Management (to whom the Secretary's authority had been redelegated) subsequently sent an April 22, 1996 "Dear Operator/Payor" letter to every federal lease operator and royalty payor in the United States. (*Id.* at 63a–68a.) That letter set forth guidelines that each lessee was *required* to follow in calculating royalties. In the words of the April 22, 1996 letter, a payor "*must follow these guidelines* to ensure proper payment of royalties and correct reporting of production." (*Id.* at 63a (emphasis added).) The mandatory nature of these instructions was repeatedly emphasized throughout the document. (*See id.* at 63a–68a ("you must value," "you must add," "you must determine," "you cannot deduct," "you must ensure," "you must use," "you cannot include," "you must convert," "you cannot take," "you must report").) With respect to allowances for the costs of dehydration and compression of coalbed methane gas, the letter provided,

> You can include costs of dehydration occurring after metering at the royalty measurement point in your transportation allowance but you cannot deduct costs of

> dehydration occurring at the wellhead. You can include costs for compression occurring downstream of the royalty measurement point, to the extent the compression is necessary for transportation.

(*Id.* at 66a.)

Petitioner is a natural gas producer with leases in various parts of the country, including the Powder River Basin of Wyoming, an area with significant coalbed methane gas reserves. From the issuance of the "Dear Operator/Payor" letter on April 22, 1996 through 2003 — a period of seven years — Petitioner consistently abided by MMS's requirements regarding the treatment of dehydration and compression costs in calculating royalties due the United States. Insofar as Petitioner is aware, the same was true for the rest of the affected industry.[4]

In 2001, a royalty dispute arose between Petitioner and the State of Wyoming, which has certain audit rights because it receives a share of royalties, over whether Petitioner was entitled to deduct *any* transportation costs in calculating

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[4] A legal dispute did arise between some producers and MMS over a separate provision in the April 22, 1996 letter providing for the non-deductibility of the costs of removing excess carbon dioxide from coalbed methane gas. MMS prevailed in that litigation. *See Amoco Prod. Co.* v. *United States*, 410 F.3d 722 (D.C. Cir. 2005) (Roberts, J.), *aff'd on other grounds sub. nom. BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84 (2006).

royalties. The State contended that deductible transportation costs did not commence until the point along the transportation route at which Petitioner had made its gas marketable through removal of excess carbon dioxide. Petitioner accordingly sought from MMS a determination that it was correctly calculating its royalty obligations.

MMS decided in Petitioner's favor on the issue raised by the State of Wyoming. (C.A. App. 57, 92.) However, in decisions issued in October 2003 and March 2004, the DOI Assistant Secretary ruled that Petitioner could not deduct post-royalty measurement point dehydration and compression costs as part of its transportation allowance. (Pet. App. 9a–10a.) The Assistant Secretary asserted that the guidance reflected in the April 22, 1996 letter from the MMS Associate Director for Royalty Management, which had been provided to Petitioner and all other lessees, was "based on a mistaken perception," and that the interpretations expressed therein were "errors" by "subordinate [DOI] officials" that were "inconsistent with or misinterpreted the marketable condition rule itself." (C.A. App. 54, 85.) The Assistant Secretary gave retroactive effect to his new interpretation of MMS's marketable condition rule, demanding that Petitioner recalculate its royalties "from the period beginning when Devon began paying royalties to the Minerals Management Service on the coalbed methane produced from the Federal leases . . . to the present," (*id.* at 55; Pet. App. 10a), even though Devon was required during this period to comply with the April 22, 1996 letter.

Petitioner sought judicial review in the United States District Court for the District of Columbia, arguing, *inter alia*, that MMS's reinterpretation of its regulations was invalid for failure to observe the procedural requirements of 5 U.S.C. § 553. The district court denied Petitioner's motion for summary judgment and granted Respondent's cross-motion for summary judgment. (Pet. App. 24a.) The United States Court of Appeals for the District of Columbia Circuit affirmed, concluding that although "Devon's preferred interpretation of the [marketable condition] rule is not unreasonable," (*id.* at 13a), the agency's 2003 interpretation prohibiting deduction of dehydration and compression costs was not at odds with the plain language of the regulations, (*id.* at 12a–14a). The court of appeals also rejected Petitioner's argument under 5 U.S.C. § 553, reasoning that the officials responsible for the guidance documents and the April 22, 1996 letter lacked the authority to bind MMS to the interpretations there expressed. (*Id.* at 15a–23a.)

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Divided Over Whether An Agency Must Use Notice-And-Comment Procedures To Change Its Interpretation Of A Regulation.

This case poses an unsettled question concerning the requirements for rulemaking under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* To promulgate a valid "rule," *id.* § 551(4), an agency must follow the APA's familiar notice-and-comment procedures by publishing a notice of proposed

rulemaking, providing an opportunity for comment, and issuing a "concise general statement of [the rule's] basis and purpose," *id.* § 553(b)–(c). The APA imposes this measure of procedural formality "to assure due deliberation," *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996), and "to assure fairness and mature consideration of rules of general application," *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (plurality opinion). Under the APA's judicial review provision, 5 U.S.C. § 706(2)(D), a court must set aside as unlawful any agency rule that is not the product of such notice-and-comment procedures. *See Chrysler Corp.* v. *Brown*, 441 U.S. 281, 313 (1979).

Among other exceptions to the notice-and-comment requirement, the APA provides that an agency need not observe such formality when it makes "interpretative rules." 5 U.S.C. § 553(b)(A). Distinguishing the interpretative rules that are exempt from the notice-and-comment requirement from the legislative rules[5] that are not is among the great challenges in administrative law. *See, e.g.*,

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[5] The term "legislative rules," which does not appear in the APA, refers to agency documents subject to the notice-and-comment requirement and capable of binding with the force of statutes. *See* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 893, 931 n.191 (2004). This Petition adopts the common practice of using the words "rule" and "regulation" interchangeably. *See Nat'l Treasury Employees Union* v. *Weise*, 100 F.3d 157, 160 (D.C. Cir. 1996).

Cmty. Nutrition Inst. v. *Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (per curiam) (collecting sources describing this distinction as "tenuous," "fuzzy," "blurred," "baffling," and "enshrouded in considerable smog").

It is settled that a purportedly interpretative rule that amends a prior legislative rule must be promulgated pursuant to notice-and-comment procedures. *See Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995). But when an agency promulgates a legislative rule, then issues an interpretative rule construing the legislative rule, and subsequently issues a contrary interpretative rule, the agency has also engaged in rulemaking by amending an earlier interpretative rule. *See* 5 U.S.C. § 551(5) (" 'rule making' means agency process for formulating, amending, or repealing a rule"). This scenario describes the facts of Petitioner's case, and presents the question of what requirements the APA imposes on an agency when it reinterprets its own regulations.

1. The courts of appeals are divided on the question of what procedure an agency must observe in contradicting a prior interpretative rule construing its own legislative rule. *See, e.g.*, *Paragon Health Network, Inc.* v. *Thompson*, 251 F.3d 1141, 1148 n.4 (7th Cir. 2001) (noting this split as between the D.C. Circuit and the First Circuit). The D.C. Circuit in prior decisions, along with the Third Circuit, Fifth Circuit, and Sixth Circuit, have all required notice and comment in this scenario. The First Circuit and Ninth Circuit have not.

This mature division of authority on an important issue of administrative law merits review in this Court. *See* RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.4, at 131 (4th ed. Supp. 2009) ("The circuit split on this issue has now increased, with more circuits choosing sides. . . . The Supreme Court should resolve this difference of opinion with respect to an important question that arises virtually every day at agencies.").

The division among the circuits can be traced to the leading case of *Paralyzed Veterans* v. *D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997). In that case, the D.C. Circuit considered a Department of Justice ("DOJ") regulation providing that wheelchair areas in facilities subject to the Americans with Disabilities Act must enjoy "lines of sight comparable to those for members of the general public." *Id.* at 580–81. The litigants disputed whether the regulation obliged a stadium owner to account for standing spectators in providing such lines of sight. The agency's interpretation of its own legislative rule had changed over time: A DOJ official said in a 1992 speech that the regulation did not require any attention to standing spectators, but a DOJ technical manual issued in 1994 was to the contrary. *Id.* at 581–82.

Addressing the question whether DOJ should have used notice-and-comment procedures to promulgate the manual, the D.C. Circuit agreed that "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment

rulemaking." *Id.* at 586. Having announced this "one bite at the interpretational apple" standard, PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW 716 (10th ed. rev. 2003), the *Paralyzed Veterans* court declined to invalidate the DOJ manual because the speech by a mid-level official did not reflect a definitive agency interpretation of its regulation, 117 F.3d at 587.

The D.C. Circuit first used the *Paralyzed Veterans* principle to set aside an agency rule in *Alaska Professional Hunters Ass'n* v. *FAA*, 177 F.3d 1030 (D.C. Cir. 1999). A legislative rule of the FAA required "commercial operator[s]" of airplanes to abide by certain safety standards. *Id.* at 1031–32. Alaskan hunting guides challenged an FAA Notice to Operators, promulgated without notice and comment, compelling the guides for the first time in decades to follow the "commercial operator" safety standards when using small aircraft to transport customers. *Id.*

The D.C. Circuit found that the Notice's interpretation of the legislative rule contradicted the FAA's prior interpretation, as embodied in thirty-five years of consistent but unwritten advice from the FAA's Alaska Region to the regulated hunting guides that they were not "commercial operator[s]." *Id.* at 1033–35. Accordingly, the court set aside the Notice under *Paralyzed Veterans* due to the FAA's failure to use notice-and-comment procedures. *Id.* at 1036. The *Alaska Professional Hunters* court restated the *Paralyzed Veterans* principle as follows: "When an agency has given its regulation a definitive interpretation, and later significantly revises that

interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment." *Id.* at 1034.

The D.C. Circuit's *Paralyzed Veterans* principle has been embraced by other courts of appeals. The Third Circuit recognizes that "if an agency's present interpretation of a regulation is a fundamental modification of a previous interpretation, the modification can only be made in accordance with the notice and comment requirements of the APA." *SBC Inc.* v. *FCC*, 414 F.3d 486, 498 (3d Cir. 2005) (citing *Paralyzed Veterans*). The Fifth Circuit "agree[s] with the reasoning of the D.C. Circuit [and holds that] the APA requires an agency to provide an opportunity for notice and comment before substantially altering a well established regulatory interpretation." *Shell Offshore Inc.* v. *Babbitt*, 238 F.3d 622, 629 (5th Cir. 2001) (citing *Paralyzed Veterans* and *Alaska Professional Hunters*). The Sixth Circuit likewise concludes "that once an agency gives a *regulation* an interpretation, notice and comment will often be required before the interpretation of that regulation can be changed." *Dismas Charities, Inc.* v. *DOJ*, 401 F.3d 666, 682 (6th Cir. 2005) (citing *Alaska Professional Hunters*).

The First Circuit and the Ninth Circuit, on the other hand, have rejected the *Paralyzed Veterans* principle. *See Warder* v. *Shalala*, 149 F.3d 73, 81–82 (1st Cir. 1998); *Erringer* v. *Thompson*, 371 F.3d 625, 632 (9th Cir. 2004) ("[N]o notice and comment rulemaking is required to amend a previous *interpretive* rule."); *Chief Probation Officers* v. *Shalala*, 118 F.3d 1327, 1337 (9th Cir. 1997) (White,

Retired Justice, sitting by designation) ("If an agency maintains that a rule, not held out as having the force of law, is mandated by statute, it will be legislative . . . only if it is inconsistent with an existing regulation. In other words, the rule would have to be inconsistent with another rule having the force of law, not just any agency interpretation regardless of whether it had been codified.") (citation omitted).

In addition to the attention it has received in the courts of appeals, the *Paralyzed Veterans* principle has garnered favorable mention from members of this Court. Justice Stevens, in a dissent joined by Justices Souter, Thomas, and Ginsburg, has referenced "the APA's requirement of new rulemaking when an agency substantially modifies its interpretation of a regulation." *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 912 (2000) (Stevens, J., dissenting) (citing *Paralyzed Veterans*). Justice Alito, writing for the Third Circuit as a member of that court, applied the *Paralyzed Veterans* principle in vacating an agency's rule. *Caruso* v. *Blockbuster-Sony Music Entm't Ctr.*, 174 F.3d 166, 175–77 (3d Cir. 1999) (citing *Paralyzed Veterans*), *vacated*, 193 F.3d 730 (3d Cir. 1999). This important issue of administrative law, which has divided the courts of appeals, is now worthy of the full Court's attention.

2. In applying its circuit-splitting *Paralyzed Veterans* principle to the facts of Petitioner's case, the D.C. Circuit has created a further division among those courts that recognize the principle. The decision below squarely conflicts with *Shell Offshore Inc.* v. *Babbitt*, 238 F.3d 622 (5th Cir. 2001), another

case involving MMS's contradictory interpretations of its royalty-calculation regulations. The result is a three-way split between circuits that reject the *Paralyzed Veterans* principle, circuits that apply the principle narrowly, and circuits that apply it broadly.

The D.C. Circuit continues to employ the *Paralyzed Veterans* principle when agencies reinterpret their own legislative rules without using notice-and-comment procedures. *See, e.g.*, *MetWest Inc.* v. *Sec'y of Labor*, 560 F.3d 506, 509–11 (D.C. Cir. 2009); *Envtl. Integrity Project* v. *EPA*, 425 F.3d 992, 997–98 (D.C. Cir. 2005). But the D.C. Circuit has now diverged from a sister circuit in its application of the principle. The decision below held that MMS was not required to use notice and comment to promulgate its 2003 interpretation of the market condition rule because the contrary interpretation reflected in various guidance documents, as well as the agency's consistent practice over a seven-year period, purportedly did not constitute a binding agency interpretation.[6]

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[6] (*See* Pet. App. 17a–20a (citing *Amoco Prod. Co.* v. *Watson*, 410 F.3d 722, 725 (D.C. Cir. 2005) (Roberts, J.), and *Indep. Petroleum Ass'n* v. *Babbitt*, 92 F.3d 1248, 1256–57 (D.C. Cir. 1996), for the proposition that the MMS documents at issue in this case did not bind the agency).) The delegations of authority previously described, *supra* at 3–4, were not discussed in *Amoco* or *Independent Petroleum*, presumably because they were not raised by the parties in those cases.

The Fifth Circuit reached the opposite conclusion in *Shell*, on facts less favorable to the regulated entity. *Shell* involved an MMS regulation providing that an "approved" FERC tariff could be used as the cost of transporting crude oil for purposes of calculating royalty payments due the United States. For five years, MMS had followed an unwritten but consistent practice of treating tariffs filed with FERC as having been approved by FERC, and thus allowable for purposes of royalty calculations, regardless whether FERC had affirmatively approved the tariff. 238 F. 3d at 624–26. MMS then purported to change its interpretation to require affirmative FERC approval. *Id.* at 628–29.

Relying on *Alaska Professional Hunters* and *Paralyzed Veterans*, the Fifth Circuit held that MMS was obliged to use notice-and-comment procedures in promulgating its amended interpretation. *Id.* at 629–30; *see also Torch Operating Co.* v. *Babbitt*, 172 F. Supp. 2d 113, 124–28 (D.D.C. 2001) (following *Shell* in a factually similar case).

The conflict between the D.C. Circuit and the Fifth Circuit is clear. The Fifth Circuit held that a five-year period of MMS practice, unaccompanied by any written guidance from the agency, was sufficiently authoritative to warrant notice-and-comment procedures under *Paralyzed Veterans*. *Shell*, 238 F.3d at 628–29 ("[T]he new 'rule' that Shell asserts violates the APA is not a change from a written policy statement or regulation. Rather, it is an alteration of an existing practice."). The D.C. Circuit, by contrast, held that a seven-year period of MMS practice, even when combined with written

pronouncements by agency officials, was not authoritative and therefore did not demand notice-and-comment procedures under *Paralyzed Veterans*. (Pet. App. 17a–20a.).

One might expect the opposite result in this pair of cases — if the facts of *Shell* support notice-and-comment rulemaking, Petitioner's facts should make for an even stronger case under *Alaska Professional Hunters* and *Paralyzed Veterans*. In addition to the seven-year period of consistent agency practice, Petitioner could also point to written agency instructions couched in unmistakably mandatory language. *Cf. Gen. Elec. Co.* v. *EPA*, 290 F.3d 377, 384 (D.C. Cir. 2002) ("To the applicant reading the Guidance Document the message is clear: in reviewing applications the Agency will not be open to considering approaches other than those prescribed in the Document."); *Appalachian Power Co.* v. *EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) ("[T]he entire Guidance, from beginning to end — except the last paragraph — reads like a ukase. It commands, it requires, it orders, it dictates."); *United States* v. *Chrysler Corp.*, 158 F.3d 1350, 1356 (D.C. Cir. 1998) ("[A]n agency is hard pressed to show fair notice when the agency itself has taken action in the past that conflicts with its current interpretation of a regulation."). It appears MMS's procedural obligations under the APA vary according to the forum in which judicial review is sought.

Juxtaposition of *Shell* with the decision below shows that the D.C. Circuit has aggravated the *Paralyzed Veterans* controversy into a three-way circuit split. In some circuits, like the First Circuit

and the Ninth Circuit, an agency is always at liberty to reinterpret its legislative rules without notice and comment. In the D.C. Circuit, the agency's interpretive freedom depends on the authorship of its written interpretations. Meanwhile, in the Fifth Circuit, an agency is bound by the interpretations reflected in its consistent practice, regardless whether such interpretations have been reduced to written form.

* * *

As shown above, the courts of appeals are divided on whether the *Paralyzed Veterans* principle is good law and, if so, on how to employ it when an agency takes more than one bite at the interpretational apple. Such a division of authority leaves agencies uncertain about the necessary level of procedural formality, and deprives regulated parties of information about applicable regulations that they might otherwise use in structuring their affairs. The conflicting decisions of the courts of appeals on this important question of administrative law can only be harmonized by a decision from this Court.

II. Retroactive Application Of The Agency's Changed Interpretation Of Its Regulation Cannot Be Reconciled With This Court's Precedent.

The court of appeals upheld an MMS rule "requiring Devon *retroactively* to recalculate royalties owed to the Government." (Pet. App. 2a (emphasis added).) In so doing, the decision below ran afoul of the strong anti-retroactivity principle reflected in the

decisions of this Court. Review is warranted to address this departure from precedent.

"Retroactivity is not favored in the law," and so in the absence of express statutory authorization, an administrative agency lacks the power to engage in retroactive rulemaking. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). The presumption against retroactive legislation, by Congress and by the agencies to which it delegates authority, has constitutional underpinnings and a long pedigree. *See, e.g.*, *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 266, 286 (1994) (describing expression of the "presumption against statutory retroactivity" in the Constitution's Ex Post Facto, Contracts, Takings, Attainder, and Due Process Clauses); *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring) ("The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal."). The APA lends further support to the presumption against retroactivity in the administrative law context. *See Bowen*, 488 U.S. at 224 (Scalia, J., concurring).

In this case, MMS gave its regulations a new interpretation in 2003 and compelled Petitioner to recalculate previously incurred royalties, which had already been calculated in accordance with the agency's existing interpretation. (Pet. App. 10a; C.A. App. 55.) At the time Petitioner incurred its royalty obligations, MMS allowed lessees to deduct certain compression and dehydration costs from the royalty base for coalbed methane gas. MMS turned back the

clock and demanded additional payment based on a royalty base from which compression and dehydration costs had not been deducted.

This case thus poses the question identified but left unresolved in *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 744 n.3 (1996). In *Smiley*, a case involving deference to an agency's interpretation of a statute under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), a party argued "that deferring to the regulation in this case involving antecedent transactions would make the regulation retroactive, in violation of [*Bowen*]." *Smiley*, 517 U.S. at 744 n.3.

This Court rejected the argument because there had been no agency guidance as to the meaning of the statute when the regulated conduct occurred. *Id.* ("Where . . . a court is addressing transactions that occurred at a time when there was no clear agency guidance, it would be absurd to ignore the agency's current authoritative pronouncement of what the statute means."). The Court noted, however, that *Bowen*'s presumption against retroactivity might have been in play had the agency announced a contrary interpretation contemporaneous with the regulated conduct. *Id.* ("There might be substance to this point if the regulation replaced a prior agency interpretation — which, as we have discussed, it did not."). *See also Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 127 S. Ct. 2339, 2349 (2007) ("[W]e concede that the Department may have interpreted these regulations differently at different times in their history. . . . But as long as interpretive changes create no unfair surprise — and the

Department's recourse to notice-and-comment rulemaking in an attempt to codify its new interpretation . . . makes any such surprise unlikely here — the change in interpretation alone presents no separate ground for disregarding the Department's present interpretation.") (citing *Bowen*, 488 U.S. at 212).

MMS's attempt to rewrite the rules after the game has ended presents the scenario described in *Smiley*. Although Petitioner complained of retroactivity in the questions presented in its appellate brief, the court of appeals did not address the problem of administrative retroactivity, and the decision below failed to account for Petitioner's justifiable reliance on the agency's interpretation of its own regulation. *See Landgraf*, 511 U.S. at 265 ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."); *cf. FCC* v. *Fox Television Stations, Inc.*, No. 07-582, slip op. at 11–12 (U.S. Apr. 28, 2009) (noting that an agency must "provide a more detailed justification . . . when its prior policy has engendered serious reliance interests that must be taken into account").

The decision below was thus at odds with this Court's retroactivity precedent, and review is warranted for this reason. "The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of

prime importance." *Landgraf*, 511 U.S. at 271. That is precisely the case here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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